No. 92-586

Supreme Court, U.S.
FILED
NOV 4 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1992

THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC. ("FAIR"), *et al.*,

Appellants,

against

SAUL WEPRIN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Motion of Appellees Mario Cuomo, Stanley Lundine and The Board of Elections of New York State to Dismiss or Affirm

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(2522—LC7-592—1992)

Questions Presented

I. Whether the District Court was correct in finding no violation of the one person, one vote principle where the maximum population deviation between State Assembly districts is less than ten percent and where such minor population deviations are justified in any event?

II. Whether the District Court was correct in finding no unconstitutional partisan gerrymander of the Democratic controlled Assembly where the Republican controlled Senate approved the redistricting plan for the Assembly?

III. Whether the District Court was correct in finding no violation of the Equal Protection Clause where there are rational and legitimate State interests in redistricting the Assembly as the State chose to do?

Parties to Proceedings Below

Appellants here, plaintiffs in the FAIR action below, are as follows: The Fund for Accurate and Informed Representation, Inc., Juan De Santis, Augustine C. Chen, Onel Alfaro, Margaret Quigley, Helen K. Horn, Calvin L. Walton, Juan L. Jimenez, Felix Figueroa, Alfred Hong, Emory N. Jackson and Juan De La Cruz, Brooklyn Political Action Committee, Inc., Martin Chicon, Ronald Travis, Martha Howlette, Louis Deguzman, Marion Phillips, Bay Ridge Community Council, Inc., George K. Arthur, Beverly A. Summe, Betty A. Wiedemann, Constance M. White, Eva Heaney, Larry Wilson, Barbara J. Groll, Frank DeBenedictus, Richard Birmingham, Sr., Margaret M. Filand, John A. Longeretta, Richard Ellis, Coulette Lafuente, and Edward Warnke.

Appellees here, defendants in the FAIR action below, are as follows: Saul Weprin, both Individually and as Speaker of the Assembly of the State of New York, David Gantt, both Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment, Dean Skelos, both Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment, Mario Cuomo, both Individually and as Governor of the State of New York, Stanley Lundine, both Individually and as Lt. Governor of the State of New York and as Presiding Officer and President of the Senate of the State of New York, The New York State Legislative Task Force on Demographic Research and Reapportionment, the Senate of the State of New York, The Assembly of the State of New York, and The Board of Elections of New York State.

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OCTOBER TERM, 1992.

THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC. ("FAIR"), *et al.*,

Appellants,

against

SAUL WEPRIN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Motion of Appellees to Dismiss or Affirm

Pursuant to Rule 18.6, Appellees Mario Cuomo, Stanley Lundine and the Board of Elections of New York State (the "Executive Appellees") move to dismiss or affirm the appeal filed on behalf of the Fund for Accurate and Informed Representation, Inc. ("FAIR"). The motion is

grounded on the fact that the questions presented are so insubstantial as not to need further argument.

Constitutional Provisions and Statutes Involved

This case arises under:

(a) Section I of the Fourteenth Amendment of the Constitution of the United States which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.;

(b) the First Amendment to the Constitution of the United States which provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.; and,

(c) Chapters 76, 77 and 78 of the Laws of 1992 for New York State, the portion of which pertaining to the redistricting of the New York Assembly is appended to the Jurisdictional Statement in the Appendix. See Appendix I.

Statement

New York has a bicameral Legislature consisting of a Senate and Assembly. The State Constitution at Article III, § 5, requires that valid redistricting plans for the Senate and Assembly must be enacted in the same legislation and Article III, § 14, requires that a majority of each house must approve a bill before it becomes law. Pursuant to Article IV, § 7, a bill vetoed by the Governor can become law only if two-thirds of the members of each house approve.

In early 1992 Democrats controlled the Assembly with 95 of 150 members, a majority less than two-thirds, while Republicans controlled the Senate with 35 of 61 members, also a majority less than two-thirds. Clearly, each party had the opportunity to influence the redistricting of each house because each party needed votes from the other to enact any redistricting plan, particularly a veto-proof plan.

The redistricting plan (except for modifications to two districts made in response to Department of Justice preclearance review under the Voting Rights Act) was contained in three bills passed by the Legislature between March 9, 1992 and April 1, 1992 by veto-proof majorities in each house. They became Chapters 76, 77 and 78 of the Laws of 1992. Between 11 and 24 of the 55 Republicans in the Assembly voted for one or more of the bills. At least 33 of the 35 Republicans in the Senate voted for each of the bills. The trial evidence showed that changes were made in the Assembly plan in response to Republican requests for revisions.

The District Court found that the Assembly redistricting plan does not consistently degrade Republican voters' ability to influence New York's political process as a whole and that plaintiffs had failed to prove an unconstitutional partisan gerrymander.

The Assembly plan had a maximum population deviation between districts of only 9.43%. There were legitimate reasons for even these minor deviations. The trial evidence showed that the Assembly plan was drawn to maximize opportunities for minorities protected under the Voting Rights Act to elect candidates of their choice and that minor population deviations were tolerated in order to effectuate that purpose. The plan was also drawn to comply with the provisions of the State Constitution at Article III, § 5, which limit the division of towns and prohibit the division of city blocks in the formation of Assembly districts. The plan was drawn to minimize the splitting of counties so as to join parts of counties with parts of other counties.

The District Court found that plaintiffs' complaint that "cohesive communities" or "political subdivisions" were fragmented under the plan in support of no legitimate State purpose was properly dismissed because communities and subdivisions are accorded no federal protection from fragmentation in the formation of election districts. The District Court also found that the minor population deviations of less than ten percent are presumptively valid and that plaintiffs had failed to prove a violation of the Equal Protection Clause. The District Court did not evaluate the State's reasons for the minor population deviations in the State's plan.

ARGUMENT

I.

The District Court was correct in finding no violation of the one person, one vote principle where the maximum population deviation between State Assembly districts is less than ten percent and where such minor population deviations are justified in any event.

The Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis; however, "mathematical nicety" is not a constitutional requisite. *Reynolds v Sims*, 377 U.S. 533, 568-69 (1964). Although congressional representation must be based on population as nearly as is practicable regardless of political subdivision lines, it may be feasible to use such lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the state. 377 U.S. at 577-78. That is certainly true for the New York Assembly where 150 seats far exceed the 31 congressional districts. Some deviations from strict population equality among state legislative districts may be justified by the consideration of insuring some voice to political subdivisions, as political subdivisions. 377 U.S. at 580. Thus, for nearly three decades this Court has recognized that legitimate considerations of state and local government, not just any supposed limitations on redistricting technology, may justify minor departures from strict population equality in state legislative districts.

A decennial census of all persons is inherently unable to count accurately the number of eligible voters or registered voters entitled to equal protection of their voting rights in a subsequent election. *Gaffney v Cummings*, 412 U.S. 735, 745-49 (1973). Accordingly, this Court has stated that: "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." 412 U.S. at 745. In 1983 this Court stated what its previous decisions had already established as a general matter, to wit: that an apportionment plan with a maximum population deviation under ten percent falls within the category of minor deviations insufficient to make out a prima facie case. *Brown v Thomson*, 462 U.S. 835, 842 (1983).

The Court which announced the ten percent prima facie rule in *Brown* was not unmindful of the technical advances allowing faster line drawing than had been possible in the 1970s. On the same day it decided *Brown*, the Court decided *Karcher v Daggett*, 462 U.S. 725 (1983), in which the existence of computerized line drawing was noted. 462 U.S. at 752, n. 10. However, the increasing speed with which plans may be drawn has little to do with the degree of population equality which is possible or required. Long before *Brown*, this Court required population deviations less than 10 percent in contexts other than legislative redistricting by a state. A court-ordered reapportionment plan of a state legislature must ordinarily achieve the goal of population equality with little more than *de minimus* variation. *Connor v Finch*, 431 U.S. 407, 414 (1977), citing *Chapman v Meier*, 420 U.S. 1, 26-27 (1975). Nearly mathematical precision is required for congressional redistricting. See

Wesberry v Sanders, 376 U.S. 1 (1964), and other cases cited at *Chapman v Meier*, 420 U.S. 1, at 27, n. 19.

It was not any technological limitation of line-drawing which inspired the ten percent rule. Instead, it was legitimate considerations of state policy recognized as early as 1964 by this Court in *Reynolds v Sims*, 377 U.S. 533 (1964). There is no substantial reason to re-examine the sound rule that a state redistricting plan with minor population deviations under ten percent is not sufficient to make out a prima facie case of unconstitutional inequality so as to require justification by the State.

In any event, the record provides ample justification for the State's minor population deviations in this case. Consideration of political subdivision lines and compliance with the Voting Rights Act are among the legitimate reasons for the minor variations in district populations. Patterns of voting age population distribution and registration of the sort discussed in *Gaffney v Cummings*, 412 U.S. 735, 745-49 (1973), were demonstrated here and justify the minor population deviations of New York's Assembly districts.

II.

The District Court was correct in finding no unconstitutional partisan gerrymander of the Democratic controlled Assembly where the Republican controlled Senate approved the redistricting plan for the Assembly.

In order to prove a claim of unconstitutional political gerrymandering, plaintiffs were required to prove both

intentional discrimination against an identifiable political group and a sufficiently adverse actual discriminatory effect on that group. *Davis v Bandemer*, 478 U.S. 109, 127 (1986). As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended. 478 U.S. at 129. Therefore, as in *Davis*, plaintiffs' claim turns on the effect test stated there. Unconstitutional discrimination occurs only when "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 132.

There is no factual question, substantial or otherwise, about the influence of Republicans on the political process of New York as a whole. Republicans control a majority of the Senate, a house which must approve any state legislation. Indeed, the Republican Senate approved the redistricting plans for both the Senate and Assembly. Some Assembly Republicans voted for the final Assembly plan which had been revised to accommodate their expressed desire for changes. Republican voters are represented in the Assembly by both Democratic and Republican members. Republicans' failure to win any particular Assembly seat or to win a majority of Assembly seats, particularly in a state with more registered Democrats than Republicans, is no evidence of their lack of influence on state politics as a whole. Nor does it present any substantial question of unconstitutional discrimination against them.

Of course, since no elections under the 1992 districting plan had been held at the time of trial, plaintiffs presented no evidence of any actual election results under that plan in support of their claim of discrimination. Although they

speculated about projected Assembly election results, they made no effort to project future Senate election results. Thus, plaintiffs presented no substantial factual evidence that the State's redistricting plan for Senate and Assembly would consistently degrade Republicans' influence on the New York State Legislature or on the political process as a whole.

There is no substantial basis for plaintiffs' assertion that their claim of partisan gerrymandering implicates First Amendment protections so as to warrant strict scrutiny of the State's redistricting plan. Claimant's citations to patronage dismissal cases—*Elrod v Burns*, 427 U.S. 347 (1976); and *Rutan v Republican Party of Illinois*, 497 U.S. 62 (1990)—and to ballot access cases—*Williams v Rhodes*, 393 U.S. 23 (1968); and *Anderson v Celebrezze*, 460 U.S. 780 (1983)—are distinguishable. Here, the State's redistricting plan imposes on no Republican voter any burden so substantial as dismissal from employment. Nor does New York impose any discriminatory ballot access requirements on Republican candidates. Republicans remain free to speak and associate; they retain on non-discriminatory terms, full access to the ballot for all political offices, including for each Assembly seat. They are free to vote for candidates of their choice.

No court has applied First Amendment protections to a political gerrymandering case. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success. *Badham v Eu*, 694 F. Supp. 664, 675 (N.D. Cal., 1988), cert. den., 488 U.S. 1024 (1989). This Court has noted that the threshold showing required in gerrymandering cases is peculiar to such cases and would not apply outside that context. *Davis v Bandemer*,

478 U.S. 109, at 134, n. 14. See also *Republican Party of Virginia v Wilder,* 774 F. Supp. 400, 405-407 (W.D. Va., 1991). This Court has recently stated that its cases do not hold that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. *Burdick v Takuski,* ____ U.S. ____, 112 S. Ct. 2059, 2062-63 (1992). Where state law imposes no more than reasonable, non-discriminatory restrictions on the First and Fourteenth Amendment rights of voters, a state's important interests are generally sufficient to justify the restrictions, without strict scrutiny for a compelling state interest advanced by a narrowly drawn law. 112 S. Ct. at 2063-64.

Here, the State's interests in providing some voice to its political subdivisions by respecting their boundaries and in complying with the Voting Rights Act are important interests. Those interests did not produce a redistricting plan which as a whole unconstitutionally burdened Republicans' voting rights or rights of free speech and association. The proof of this is that numerous Republican legislators, including virtually all of those in the Republican Senate, supported the State's plan.

III.

The District Court was correct in finding no violation of the Equal Protection Clause where there are rational and legitimate State interests in redistricting the Assembly as the State chose to do.

Appellants concede that if there is any legitimate or rational state policy which justifies the fragmentation of "communities of interest" and "political subdivisions",

then their claim of unconstitutional fragmentation would fail. Jurisdictional Statement, at 26. They concede that where neither a suspect class nor a fundamental right is implicated, a court will review a classification with deference and with a heavy presumption of constitutionality. Jurisdictional Statement, at 27. Appellants do not argue that any particular neighborhood, city, town, geographical or interest community is entitled to be grouped together as a single election unit. Jurisdictional Statement, at 26.

The Equal Protection Clause allows New York considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are usually presumed to have acted constitutionally. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's legitimate goals and only if no grounds can be conceived to justify them. *Clemenis v Fashing*, 457 U.S. 957, 962-63 (1982).

There is no substantial basis to argue that no legitimate State purpose can be conceived to justify the fragmentation of some political subdivisions and communities of unspecified interest. Substantial population equality, and compliance with the Voting Rights Act are among the legitimate State interests which justify the fragmentation of any particular community. *Reynolds v Sims*, 377 U.S. 533 (1964); *Thornburg v Gingles*, 478 U.S. 30 (1986).

CONCLUSION

For the foregoing reasons, this Court should dismiss or affirm the appeal because the questions presented are so insubstantial as not to need further argument. The District Court correctly applied the law to the facts found on this case.

Dated: Albany, New York
October 30, 1992

Respectfully submitted,

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